No. 86-98

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

GREGORY L. RIVERA,
Appellant

v.

JEAN MARIE MINNICH,
Appellee.

On Appeal from the Supreme
Court of Pennsylvania

BRIEF FOR THE PEOPLE OF THE STATES OF CALIFORNIA, FLORIDA, ILLINOIS, KANSAS, MICHIGAN, MINNESOTA, MONTANA, NEVADA, SOUTH DAKOTA, TENNESSEE; THE APPELLATE COMMITTEE OF THE CALIFORNIA FAMILY SUPPORT COUNCIL, AND THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION AS AMICI CURIAE

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QUESTION PRESENTED

Does the law of the State of Pennsylvania which, consistent with the law of at least 40 states permitting paternity to be established by the

preponderance of the evidence, violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

INTEREST OF AMICI CURIAE

This case presents a significant issue regarding the standard of proof to be applied in actions to establish paternity. The vast majority of states, whether by statutory or case law, rely on a standard of preponderance of the evidence. Appellant seeks to require a standard of clear and convincing evidence, which is relatively uncommon in civil cases.

The issue of establishment of paternity is a matter of great public concern. The rate of out-of-wedlock births has increased dramatically in the United States. In 1960 only 5 percent of

births were out of wedlock; by 1981 the number had increased to 19 percent. (Click, "American Household Structure in Transition," Family Planning Perspectives (Sept/Oct 1984) p. 206.) Nonmarital births have serious repercussions for the children born out of wedlock, for their mothers and for the taxpayers.

Harry D. Krause, a professor of law at the University of Illinois, wrote in Child Support in America, The Legal Perspective (1981):

> "All abandoned children are in the same straits regarding their need for support and to locate an absent parent. The child of unmarried parents, however, struggles against the further obstacle of uncertain paternity and a long (though fortunately nearly lost) tradition of legal discrimination. Within the context of the child support enforcement problem, special emphasis thus must be placed upon those children who, in addition to locating their father and making him pay, must first identify him legally." (Id., at p. 103.)

A child whose paternity is established is in a position to receive numerous benefits including access to entitlement programs (e.g., Social Security, veteran's benefits) and receipt of child support.

Out-of-wedlock births seriously impact on the mothers of the children. Teenagers account for more than half of all nonmarital births in the United States. (U.S. Department of Health and Human Services, National Center for Health Statistics, Vital Statistics of the United States, published in Statistical Abstract of the United States (1981), p. 65.) Many of these mothers do not complete high school and lack marketable skills. Typically, they enter a pattern of unemployment, poverty, welfare dependency and repeated pregnancies. (U.S. Department of

Commerce, Bureau of the Census, Marital Status and Living Arrangements.)

Finally, there is the impact on taxpayers. It is estimated that 60 percent of the children born out of wedlock who are not adopted receive welfare. (U. S. Report of the Census, Child Support and Alimony; Current Population Reports, Rept. 112; U.S. Bureau of the Census.) The realization that the public is carrying a weighty financial burden which ought to be assumed by parents resulted in enactment of strong child support enforcement legislation at the federal level and enhanced child support enforcement activities by the states.

The People of the states filing this brief have a significant responsibility in protecting the interest of children born out of wedlock, the rights of their

mothers in obtaining equitable support from their fathers, and the concerns of the taxpayers in the preservation of public treasuries from making payments which should be made by persons responsible for the support of their own children.

Appellant's position, should it prevail, would make it more difficult for the states to carry out their responsibility in the establishment of paternity by imposing a higher, and less clear, burden of proof. The interest of alleged fathers should not be permitted to outweigh the vital interest of children, mothers and the public. This would be the result if a standard greater than a preponderance of the evidence were required.

ARGUMENT

THE STANDARD OF PROOF OF A PREPONDERANCE OF THE EVIDENCE IN ACTIONS TO ESTABLISH PATERNITY DOES NOT IMPAIR THE RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION

Pennsylvania, as well as the vast majority of states, provides that the establishment of paternity is a civil proceeding. This is in conformity with the Uniform Parentage Act, which provides, in pertinent part, that an action brought under its purview "is a civil action governed by the rules of civil procedure." (Uniform Parentage Act, § 14.) The standard of proof in most civil actions is the preponderance of evidence test.

A preponderance of the evidence test for actions to establish paternity comports with the Due Process clause of the Fourteenth Amendment. In Addington

v. Texas 441 U.S. 418, 423 (1979), this Court noted that the purpose of a standard of proof, as embodied in the Due Process Clause, is to "'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of action.'" (Quoting In re Winship 397 U.S. 358 (1970),concurring opinion of Harlan, J., at 370.) In Mathews v. Eldridge 424 U.S. 319 (1976), this Court, in analyzing whether due process requirements mandated pre-termination hearings in regards to Social Security disability payments, considered: 1) the private interest that would be affected by the official action; 2) the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural

safeguards; and 3) the governmental interest, including the function involved and the fiscal and administrative burden that the additional or substitute requirements would entail. This Court has utilized these factors in considering the due process requirements for the burden of proof in involuntary commitment proceedings (Addington v. Texas, supra, 441 U.S. 418); the right to appointed counsel in actions for the termination of parental rights (Lassiter v. Department of Social Services 452 U.S. 18, 27 (1981); the burden of proof required for the termination of parental rights (Santosky v. Kramer 455 U.S. 745, 754 (1982); and allocation of blood test costs in paternity actions (Little v. Streater 452 U.S. 1, 13 (1980). A similar analysis is applicable to the issue raised herein.

A. The Private Interests Affected

The private interests at stake are substantial; but they are substantial not only for alleged fathers, but also for the children and their mothers.

In Little v. Streater, supra, 452 U.S. at page 13, this Court held that the putative father had a pecuniary interest in avoiding substantial support obligations, a liberty interest which could be threatened by possible sanctions for noncompliance, and an interest in the creation of the parent-child relationship. However, these interests were defined in the context of whether an indigent defendant in a paternity action should be required to forgo blood tests due to his inability to pay for such tests.

A substantial interest of a putative father in a paternity action is to avoid

the financial obligations which result from a determination he is the father of the child. This is not different from most other civil actions, where the defendant has a strong desire not to become liable to the plaintiff for a large sum of money. Due process requires no more than a preponderance test in those actions. (Addington v. Texas, supra, 441 U.S. at 423.)

The threat of loss of liberty is more problematical. Effective June 27, 1978, the Pennsylvania Civil Procedure Support Law abolished the right to a criminal proceeding on the issue of paternity. (Act No. 1978-46, P.L. 106.)

A determination of paternity does not place a defendant's liberty at peril. That would require a subsequent intervening act: the willful refusal to pay a support order by a person with the

financial ability to pay. A father with a limited ability to pay support can have his obligation adjusted to fit his ability (Uniform Parentage Act § 15(e)), and even in the absence of ability to pay, the child may gain access to entitlement payments.

Moreover, any number of orders arising in civil cases, such as injunctive orders, may be established by a preponderance of evidence even though violation may result in the loss of liberty. Furthermore, in analyzing the private interests affected, the interest of the child and the mother must be considered. In Santosky v. Kramer, supra, 455 U.S. at p. 745, it was held:

> ". . .in any given proceeding, the minimum standard of proof tolerated by due process requirements reflect not only the weight of the private and public interests affected but

> also a societal judgment about how the risk of error should be distributed between the litigants."

In a paternity proceeding, unlike the parental rights termination considered in Santosky, the private interest of the child (and of the mother) is not parallel but in fact, adverse to, the interest of the defendant in the factual determination of paternity. The interest in maintaining a parent-child relationship has been deemed "a compelling one, ranked among the most basic of civil rights. (In re B.C. (1974) 11 Cal.3d 679, 688; 114 Cal.Rptr. 444, 456; see Stanley v. Illinois (1972) 405 U.S. 645, 651.)

The preponderance of evidence standard indicates society's conclusion that litigants should share the risk of error in roughly equal fashion. (Addington v. Texas, supra, 441 U.S. at

p. 423.) Where the interest of the child and of the mothe. are at least as great as the interest of the putative father, the risk of error should be shared in roughly equal fashion. This is not a situation, such as in Addington, where the risk of error to the defendant is significantly greater than any possible harm to the adverse party.

Moreover, it must be noted that the state is not involved in all paternity actions. The effect of increasing the burden of proof to clear and convincing evidence would impact on plaintiffs including mothers and children not represented by public entities whose interest in justice should not be diminished in favor of an alleged father's interest. A test of preponderence of the evidence provides for an equal sharing of the risk.

B. Risk of Erroneous Deprivation

The risk of erroneous deprivation as the result of a burden of proof of the preponderance of the evidence has been substantially minimized by both scientific and procedural advances. Moreover, such erroneous determinations as do occur would not be prevented by the imposition of a standard of clear and convincing evidence.

In a concurring opinion in Mills v. Habluetzel 456 U.S. 91 (1982), Justice O'Connor noted that "recent scientific developments in blood testing dramatically reduce the possibility that a defendant will be falsely accused of being the illegitimate child's father." (Id., at 104, fn. 2.) Indeed, in the overwhelming majority of cases, scientific evidence is available which drastically reduces the risk of error in

any paternity proceeding. The evidence is available to be used as probative evidence of paternity in an overwhelming majority of states including Pennsylvania. That blood tests as evidence of probability of paternity has achieved almost universal acceptance is illustrated by the fact that courts in 34 states and the District of Columbia have upheld the affirmative use of paternity tests: State of Arizona v. Bravo (1984) 139 Ariz. 393, 678 P.2d 974; Bradley v. Houston (1984) 12 Ark.App.351, 676 SW 2d 746; Cramer v. Morrison (1974) 88 Cal.App.3d 873, 153 Cal.Rptr. 865; Moore v. McNamara (1986) 201 Conn. 16, 513 A.2d 660; Cutchember v. Payne (1983) 466 A.2d 1240, [District of Columbia]; Carlyon v. Weeks (Ct. App. 1980) [Florida]; 387 So.2d 465; Raines v. White (1981) 248 Ga.

406; 284 SE.2d 7; Crain v. Crain (1983) 104 Idaho 666; 662 P.2d 530; People v. Alzoubi (1985) 133 Ill.App.3d 806, 479 NE.2d 1208; Davis v. State (Ct. App. 1985) 476 N.E.2d 127 [Indiana]; State of Iowa v. Vinsand (Sup. Ct. 1982) 318 N.W.2d 208; Tice v. Richardson (1982) 7 Kan.App.2d 509, 644 P.2d 490; Bartlett v. Commonwealth of Kentucky (Sup.Ct. 1986) 705 S.W.2d 470; State Through Department of Health v. Smith (Ct. App. 1984) 459 S.2d 146 [Louisiana]; State of Maine v. Thompson (Sup.Ct. 1986) 503 A.2d 689; Haines v. Shanholtz (1984) 57 Md.App.92, 468 A.2d 1365; Commonwealth v. Beausoleil (1986) 397 Mass. 206, 490 N.E.2d 788; Pizana v. Jones (1983) 127 Mich.App. 123, 339 N.W.2d 1; Hennepin County Welfare Board v. Ayers (Sup.Ct. 1981) 304 N.W.2d 879 [Minnesota];

Imms v. Clarke (Mo.App. 1983) 654 S.W.2d 281; J.H. v. M.H. (1980) 177 N.J. Super.436, 426 A.2d 1073; State of New Mexico v. Coleman (July 29, 1986) 723 P.2d 971; Bowling v. Coney (1983) 91 A.D.2d 1195, 459 NY.2d 183 [New York]; Cole v. Cole (1985) 74 N.C.App. 247 328 S.E.2d 446; State v. Unterseher (Sup.Ct. 1977) 255 N.W.2d 882 [North Dakota]; Owens v. Bell (1983) 6 Ohio St.3d 46, 451 N.E.2d 241; Callison v. Callison (Sup.Ct. 1984) 687 P.2d 106; Plemel and State of Oregon v. Walter (1986) 80 Or.App. 250, 721 P.2d 474; Turek v. Hardy (1983) 312 Pa. Super. 158, 458 A.2d 562; Corley v. Rowe (1984) 280 S.C. 338, 12 S.E.2d 720; Biley v. Williams (July 8, 1986) __ S.W.2d__ [Tennessee]; In re E.G.M. (Ct.App. 1983) 647 S.W.2d 74; Phillips v. Jackson (Sup.Ct. 1980) 615 P.2d 1228 [Utah];

Hankerson v. Moody (1985) 229 Va. 270, 329 S.E.2d 791; State of Washington v. James (1984) 38 Wash.App. 264, 686 P.2d 1097.

In addition, 12 other states have statutes providing for the admissibility of blood test evidence:

Alabama -- Ala. Code 26-17-12;

Colorado -- C.R.S. 13-25-126;

Delaware -- Del. Code Title 13, § 811;

Hawaii -- H.R.S. § 584-12;

Montana -- M.C.A. § 40-6-113;

Nevada -- N.R.S. 126.131;

New Hampshire -- RSA § 522:4;

Rhode Island -- Gen.L. § 15-8-11;

Vermont -- Vt. Stats. Title 15 § 304;

West Virginia -- W.Va. Code 48A-6-3

Wisconsin -- W.S.A. §§ 767.47 (1)(d) 767.48; 885.23;

Wyoming -- Wyo. Stats. § 14-2-110.

State courts across the country have held, following Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) that inclusionary blood test results, and the statistical probabilities drawn therefrom, are admissible in paternity litigation. Indeed, the Supreme Judicial Court of Massachusetts, while noting that "[t]he admission of evidence of statistical probability is disfavored in this Commonwealth," Commonwealth v. Beausoliel, 397 Mass. 206, 490 N.E.2d 788, 795 n. 15, also commented in holding HLA results to be admissible, "those courts in other jurisdictions that have determined the admissibility of inculpatory HLA test results by reference to Frye have concluded unanimously that such evidence is generally accepted as reliable in the scientific community."

490 N.E.2d at 794 (footnote omitted; emphasis added).

Thus, in modern paternity litigation, with the scientific procedures available, the risk of an erroneous determination is extremely small despite the nature of the nonmedical evidence. (See Joint AMA-ABA Guidelines: Present Status of Serological Testing, 10 Family L.Q. 247 (1976).)

Additionally, there is an increasing tendency to require the appointment of counsel for indigent defendants in paternity actions where the state appears as a party or on behalf of the mother or child: Alaska (Reynolds v. Kimmons (1977) 569 P.2d 799), 154 Cal.Rptr. 524; California (Salas v. Cortez (1979) 24 Cal.3d 22 154 Cal.Rptr 529, cert den. 444 U.S. 900); Indiana (Kennedy v. Wood (1982 Ind. App.) 439 N.E.2d 1367);

Michigan (Artibee v. Cheboygan Circuit Judge (1976) 397 Mich. 54, 243 N.W.2d 248); Minnesota (Hepfel v. Bashaw (1979) 279 N.W. 342); New Jersey (T. v. S. (1979) 169 N.J. Super. 209, 404 A.2d 653; New York (B. v. D. (1979) 99 Misc.2d 1085, 418 N.Y.S.2d 271); and the Uniform Parentage Act, section 19.

The combination of procedural and scientific advances to an accused father substantially minimize the risk of an erroneous determination. As this Court observed in Addington v. Texas, supra, 441 U.S. at pages 417-418:

> "Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests [preponderance, clear and convincing and beyond a reasonable doubt] . . . may well be largely an academic exercise; there are no directly relevant empirical studies. . . . We probably can assume no more than that the difference between a preponderance of the evidence

> and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence." (Fn. omitted.)

Thus, the probable gain from appellant's proposed change in the burden of proof would be an increase in confusion rather than a decrease in erroneous determinations of paternity.

C. The Governmental Interest

The states have a valid interest in the welfare of a child born out of wedlock and who is receiving public assistance, as well as in securing support for the child from those legally responsible. Additionally, it shares the interest of the child in an accurate and just determination of paternity. (Little v. Streater, supra, 452 U.S. at p. 14.) In enacting the Social Service Amendments of 1974 (Pub.L. 93-647), the Senate

Committee on Finance noted "a child born out-of-wedlock has the right to have its paternity ascertained in a fair and efficient manner [and] . . . the interest primarily at stake in the paternity action . . . is . . . that of the child." (Senate Rept. No. 93-1356 (1974) at p. 52.) Clearly, the governmental interest in promoting the best interest of the child is at stake.

The states also have a considerable interest in seeing that the rights of the mother to receive child support are vindicated. The receipt of child support is often the difference between an independent life and welfare dependency. In Addington v. Texas, supra, this Court found that the preponderance of evidence test was insufficient to uphold the due process rights of individuals faced with civil commitment. The Court

held the individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. (Id., at p. 427.) The instant situation is very different. There is the interest of the child in ascertaining its parent and obtaining the support to which it is entitled; there is the interest of the mother in receiving child support and avoiding welfare dependency; there is the interest of the states in protecting the rights of its citizens and defending the public coffers. The potential injury to the alleged father is certainly no greater than the potential injury to the child, the mother, and the states. Accordingly, a preponderance test is justified and does not violate the due

process clause of the Fourteenth Amendment.

CONCLUSION

What is at stake is not the defendant's loss of liberty, nor the uprooting of his family relationship, nor the loss of any vested right. The primary issue is one of civil relationship of a father to his child, to the child's mother, and to the governmental entity which may be supporting both. A preponderance test is not only justified, but any other test may be improper:

> "Since the establishment of the child's civil relationship with its father is involved, serious doubts must be expressed as to the constitutionality of . . . those civil paternity statutes that raise the requirement of proof to a level higher than that required for other civil actions." (Krause, supra, Child Support in America, at pp. 190-191, emphasis in Text, fn. omitted.)

The decision of the Pennsylvania Supreme Court below properly allocates the burden of proof by requiring appellant's civil obligation be established by a preponderance of the evidence. Accordingly, the judgment of that court should be affirmed.

Dated: February 2, 1987

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AFFIDAVIT OF MAILING AND CERTIFICATE OF SERVICE

M. HOWARD WAYNE, being duly sworn, deposes and says:

I am a member of the Bar of the Supreme Court of the United States.

On February 9, 1987, I deposited in the mailbox at 110 West A Street, San Diego, California, 92101, an envelope addressed to the Clerk of the Supreme Court of the United States, first-class postage prepaid, containing 40 copies of amici curiae brief in the above-entitled case.

I also certify that on February 9, 1987, 3 copies of amici curiae brief were mailed to each addressee named below:

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I further certify that all parties required to be served have been served.

M. Howard Wayne

M. HOWARD WAYNE

ATTESTATION BY NOTARY

State of California)
) ss:
County of San Diego)

On this 9th day of February 1987, before me Vida Allen, Notary Public, personally known to me to be the person whose name is subscribed to this instrument, and acknowledged that he executed it.

Vida M. Allen

Notary Public

VIDA M. ALLEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1990